No. 886

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE BOEING COMPANY, a Delaware corporation, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. In support of the decision below, and in opposition to the Petition, the Government argues that to include progress payments in Petitioner's "total assets" would "result(ed) in a duplication of items and a consequent exaggeration of taxpayer's investment for excess profits tax credit purposes." (Govt. Brief 5). This contention entirely overlooks the treatment of borrowed money under the applicable law and that progress payments "performed the same functions as loans" (Govt. Brief 4; App. to Pet. 29-30).

Had Petitioner not received the progress payments in issue here, it would have availed itself of commercial loans

to obtain necessary working capital (App. to Pet. 42-43). Under Section 442(f) of the 1939 Code, borrowed money is considered part of the taxpayer's "total assets," without any reduction being required to work-in-process inventories. Its "total assets" then would have included both its work-in-process inventory and the amount of such borrowed money. Because progress payments are intended and treated as the equivalent of loans, they also should be included in "total assets" without reduction to work-in-process inventories.

Thus, the ultimate issue remains: were the progress payments made and received as part payments of an agreed purchase price incident to a concurrent sale of bits and pieces of airplanes, or were they merely a financing device, substantially equivalent to a loan, giving rise to a liability having no effect on total assets? The Government's brief in opposition to the Petition entirely ignores this critical issue.

2. *Anderson Brothers Corp. v. Commissioner*, 34 T.C. 199, affirmed, 296 F.2d 627 (5th Cir. 1961), relied on by both the court below (App. to Pet. 26-27) and the Government (Govt. Brief 5), offers no support for the Government's position. That case involved the sales of services, not manufactured products, and each payment was a *pro tanto* payment for services rendered. Here the payments are of an entirely different nature, for no sale was made until the completed product (an aircraft) was delivered to and accepted by the United States. The progress payments were not in exchange for products or services sold, but were in the nature of loans. *Consolidated-Hammer Dry Plate & Film Co. v. Commissioner*, 317 F.2d 829 (7th Cir. 1963).

3. A real and critical conflict exists. The holding of the Court of Claims and the arguments of the Government are premised on the contention that a sale of property takes

place upon receipt of progress payments and that such payments are "substituted" for the property sold. To the contrary the Seventh Circuit, in *Consolidated-Hammer Dry Plate & Film Co. v. Commissioner, supra*, held that no such sale takes place, but rather the progress payments are part of a financing arrangement, to be treated as loans. Likewise *American Motors Corp. v. City of Kenosha*, 274 Wis. 315, 80 N.W.2d 363 (1957), held that there was no sale of property in exchange for the progress payments. The Court affirmed that decision *per curiam* at 356 U.S. 21, reh. denied 357 U.S. 912 (1958).

Either there is a conflict or the Court of Claims is in error and should be reversed. Petitioner submits that a clear and far-reaching conflict exists. That conflict relates to a vital question of Federal law, pertaining not only to internal revenue, but also to Government contracts, state taxation of property and the interests of private creditors in property being manufactured for the Government. This Court is the proper forum and this is an appropriate case to resolve this conflict.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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